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No. 90-1482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

IN RE: IONOSPHERE CLUBS, INC. and EASTERN AIR LINES, INC.,
Debtors.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, AFL-CIO,
Petitioner,

v.

MARTIN R. SHUGRUE, JR., as Chapter 11 Trustee for EASTERN AIR LINES, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Instead of responding to the issues raised in ALPA's petition ("Pet."), Eastern's brief in opposition ("Opp. Br.") raises frivolous arguments that the petition is premature and moot, and then attempts to convert fundamental questions concerning bankruptcy court jurisdiction into a matter of venue. Eastern's brief in opposition offers nothing to undercut the compelling grounds for granting the petition.

A. Eastern argues that a writ of certiorari should be denied because the decision of the court of appeals, which remanded certain issues, did not end the litigation brought

by Eastern to enjoin ALPA's district court lawsuit. Opp. Br. at 9. This argument is without basis. In *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947), this Court held that review of a non-final decision by a court of appeals is appropriate so long as the decision "involved an issue 'fundamental to the further conduct of the case'" (quoting *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945)). Here, the question of jurisdiction is fundamental: absent the decision of the court of appeals that the bankruptcy court had the jurisdiction to determine the wet-leasing action, the bankruptcy court's order would have been reversed as a matter of law, and the litigation would have terminated. Similarly, if this Court issues a writ of certiorari and reverses the court of appeals, the Court's decision will end the litigation brought by Eastern in the bankruptcy court.[1]

The authorities cited by Eastern do not support its strained position that this Court should not review the decision below. While Eastern cites the sole dissenting opinion in *Estelle* v. *Gamble*, 429 U.S. 97 (1976), Opp. Br. at 8 n.5, the majority in that case determined to review a non-final decision by the court of appeals. *See* 429 U.S. at 98.[2] The other authorities relied upon by Eastern, *see, e.g., American Constr. Co.* v. *Jacksonville*,

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[1] Indeed, the district court in New York, on stipulation of the parties, has postponed proceedings on the remanded issues in light of the pending petition for certiorari.

[2] Similarly misplaced is Eastern's citation of Supreme Court Rule 11. Opp. Br. at 8 n.4. That Rule, based on 28 U.S.C. § 2101(e), applies only to cases where the court of appeals has not issued *any* ruling, not even an interlocutory one. The rule provides, however, that review may be appropriate even in those cases. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 686-87, 687 n.1 (1974). The general policy against review of interlocutory orders cited by Eastern, *see* Opp. Br. at 8-9, relates to a statute directed specifically at courts of appeal. *See In re King Memorial Hospital, Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985); 28 U.S.C. §§ 1291, 1292. There is no analogous statute restricting interlocutory review by this Court.

Tampa & Key West Co., 148 U.S. 372 (1893), Opp. Br. at 8, are clearly contrary to the Court's current practice of granting a writ of certiorari to review an interlocutory decision where, as here, review is appropriate. *See, e.g., Air Line Pilots Ass'n, Int'l* v. *O'Neill*, 111 S. Ct. 1127, 1133 (1991); *Begier* v. *IRS*, 110 S. Ct. 2258 (1990), *affirming* 878 F.2d 762 (3d Cir. 1989).

B. Eastern asserts that the order below has been rendered moot by Eastern's termination of its wet-leases and cessation of operations.[3] Opp. Br. at 10-17. Eastern concedes, however, that ALPA's district court lawsuit, which was the subject of the bankruptcy court injunction affirmed below, sought the recovery of damages, as well as other relief, based on a violation of the Railway Labor Act. Opp. Br. at 14. Eastern, despite the termination of the wet-leasing, did not raise a question of mootness in the courts below. Eastern's suggestion of mootness in this Court is frivolous. This Court has repeatedly held that a controversy is not moot, even if injunctive or other relief is no longer available, as long a claim for damages remains at issue. *City of Richmond* v. *J.A. Crosson Co.*, 488 U.S. 469 (1989); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 8-9 (1978); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 154, n.3 (1978); *cf. Powell* v. *McCormack*, 395 U.S. 486, 496-500 (1969).[4]

C. The petition does not seek to have the Court address an issue of venue. Rather, as already demonstrated (Pet. 20-21, 25-28), the power of the bankruptcy court to decide, as a matter of first instance, cases arising exclu-

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[3] Eastern never attempts to explain the relevance of its cessation of operations, since the wet-leasing had terminated long before the cessation of operations.

[4] The validity of ALPA's cause of action and the calculation of the amount of damages owed is, as argued in our petition for certiorari, a matter for the district court. What percent of the damages award is eventually paid might be determined in the bankruptcy court, along with all of Eastern's other liabilities, pursuant to a reorganization plan.

sively under non-bankruptcy law concerns the jurisdiction —and not the venue—of Article I bankruptcy courts pursuant to 28 U.S.C. § 157 and the U.S. Constitution.

Indeed, in *Northern Pipeline Constr. Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982), this Court held that the then existing Bankruptcy Code violated Article III of the Constitution by granting essential judicial functions to tribunals lacking the constitutional assurances necessary to an independent judiciary. Congress responded by enacting Section 157 of the Judiciary Act. 28 U.S.C. § 157. Section 157 sharply circumscribes the jurisdiction of bankruptcy courts to decide non-bankruptcy law issues. In subsections (b) and (c), Congress limited the universe of proceedings in which bankruptcy courts could issue final orders. *See* 28 U.S.C. §§ 157(b) and (c). In subsection (d), Congress ensured that the bankruptcy court functions as a specialized adjunct of the district courts by *requiring* district courts to withdraw the reference of adversary procedings requiring consideration of non-bankruptcy federal law. *See* 28 U.S.C. § 157(d).

The Second Circuit erroneously interpreted Section 157 and returned to the bankruptcy courts the broad grant of jurisdiction which Congress plainly intended to curtail in light of this Court's decision in *Marathon*. *See* Pet. at 23-24, 26-28. The petition seeks review of the Second Circuit's decision because it conflicts with decisions in other circuits and denies ALPA the fundamental right to have the wet-lease dispute heard by an Article III court. Thus, contrary to Eastern's claim, the overriding issue raised in the petition is whether Congress vested bankruptcy courts with the *jurisdiction* to decide pure non-bankruptcy issues. Try as it may, Eastern does not and cannot demonstrate that "ALPA is seeking a writ of *certiorari* merely to have the Court address an issue of venue." Opp. Br. at 18.[5]

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[5] For many years, ALPA and Eastern have litigated various issues in the Southern District of Florida, where Eastern's head-

D. Eastern's minimal review of the substantive issues raised by ALPA only demonstrates the appropriateness of granting the petition.

1. Eastern asserts that the Second Circuit's interpretation of a "core" proceeding below and in *In re Ben Cooper*, 896 F.2d 1394 (2d Cir.), *vacated*, 111 S. Ct. 425 (1990), does not conflict with the formulation in *In re Wood*, 825 F.2d 90 (5th Cir. 1987) and its progeny. However, Eastern offers no analysis and does not even review or mention the standards.[6] It also ignores that this Court previously granted a writ of certiorari in *Ben Cooper*, 110 S. Ct. 3236, *vacated*, 111 S. Ct. 425 (1990). The conflict amongst the courts of appeals is clear.

Eastern, in another argument frivolously raised for the first time in this Court, suggests that the "core" proceeding issue is irrelevant because ALPA "submitted itself" to the jurisdiction of the bankruptcy court. Opp. Br. at 21-22. Participation in various bankruptcy proceedings cannot constitute consent to have all causes of action, brought in whatever forum, adjudicated as a core proceeding in the bankruptcy court, and Eastern

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quarters are located. *See* Pet. at 3-4 n.3 and 4; Opp. Br. at 17. Eastern did not file its Chapter 11 Petition in the Southern District of Florida. Instead an affiliate of Eastern, Ionosphere Clubs, Inc., filed a petition in the Southern District of New York on May 9, 1989, and Eastern filed there later that day.

[6] While Eastern does note that *Wood* involved a state law claim, Opp. Br. at 23, it ignores that *Wood* has been followed by other courts of appeal in cases involving claims arising under federal law. Pet. at 22.

Eastern also appears to formulate a new theory of "core" proceedings. Eastern asserts that the labor law dispute involved in ALPA's wet-lease lawsuit is a core proceeding because the flying at issue was "core" to Eastern's operations. Opp. Br. at 23. "Core" issues under Section 157 refer to issues at the "core of restructuring debtor-creditor relations," *Marathon*, 458 U.S. at 71, not to the "core" of a debtor's operations.

submits no authority for that preposterous suggestion.[7] The wet-lease lawsuit is not a core proceeding, and ALPA has so asserted ever since the bankruptcy court unilaterally determined that it could and would determine the merits of a wet-lease lawsuit that was not before it.[8]

2. The Second Circuit's consideration of Section 157(d), which provides for withdrawal of the reference to the district court, certainly was relevant. ALPA initially filed a district court lawsuit alleging violations of federal labor law. If such a lawsuit had initially been filed in the bankruptcy court it would have been subject to a mandatory withdrawal of the reference to the district court. Pet. at 26-29. It would violate congressional intent and the entire structure of bankruptcy jurisdiction enacted in reaction to *Marathon* for a bankruptcy court to enjoin a non-bankruptcy federal cause of action, which would have been subject to a mandatory withdrawal of the reference, in circumstances where the lawsuit was initially brought in district court.[9]

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[7] Eastern's complaint in the bankruptcy court sought relief only pursuant to Bankruptcy Code sections 362 and 105 to enjoin ALPA's wet-lease lawsuit. The automatic stay, on its face, bars the continuation of litigation in any forum, with no explicit exception for the bankruptcy court. The bankruptcy court determined, without request or notice, the merits of issues under the Railway Labor Act raised in the wet-lease lawsuit. ALPA thereafter appealed to the district court and argued that the bankruptcy court had improperly reached the merits of the RLA issues and thereby improperly determined the merits of a "non-core" matter. ALPA Brief to the District Court at 40-42.

[8] Unlike all the cases cited by Eastern, Opp. Br. at 22 n.9, ALPA filed a district court lawsuit raising non-bankruptcy issues, and appeared in the bankruptcy court on those issues only to the extent of opposing the grant of injunctive relief against that lawsuit. ALPA's proof of claim, while not relevant in these circumstances to the question of "core" power over a non-bankruptcy federal cause of action, did not cover the wet-lease lawsuit.

[9] The question of whether ALPA moved for a withdrawal of the reference is irrelevant. As noted *supra*, n.7, only questions

3. Finally, Eastern attempts to reconcile the application in this case of Bankruptcy Code section 362 with section 1113, emphasizing the need for a close reading of section 1113's language. Opp. Br. at 27-30. The language of section 1113, however, unmistakably indicates a Congressional intent to override other Code sections that might be interpreted to interfere with enforcement of a collective bargaining agreement: "No provision of [the Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of [section 1113]." 11 U.S.C. § 1113(f). Section 1113, the more recently enacted statute, must prevail in any conflict with Section 362. The main purposes of the automatic stay are to give debtors a "breathing spell" and to prevent one creditor from having its rights adjudicated before another creditor. *See* Sen. Rep. No. 95-989, 95th Cong., 2d Sess. 49, 54 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5835, 5840. As ALPA demonstrated in its petition, centralization of disputes *per se* is not a goal of the automatic stay. Pet. at 16-17. To the extent centralization is considered a goal, it cannot supersede the limits on bankruptcy court jurisdiction contained in section 157 or the clear language of section 1113.

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under Section 362 and 105 were raised by Eastern's lawsuit in the bankruptcy court. After the bankruptcy court determined the merits of the RLA issues, ALPA raised on appeal to the district court that if the labor law issues had been before the bankruptcy court the lawsuit would have been subject to a mandatory withdrawal of the reference. ALPA Reply Brief in the District Court at 18-19.

CONCLUSION

For the reasons stated above and in the certiorari petition, a writ of certiorari should be granted.

Respectfully submitted,

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